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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 509

FRANK MORGAN, Administrator of the Estate of William Nicholas,

Petitioner,

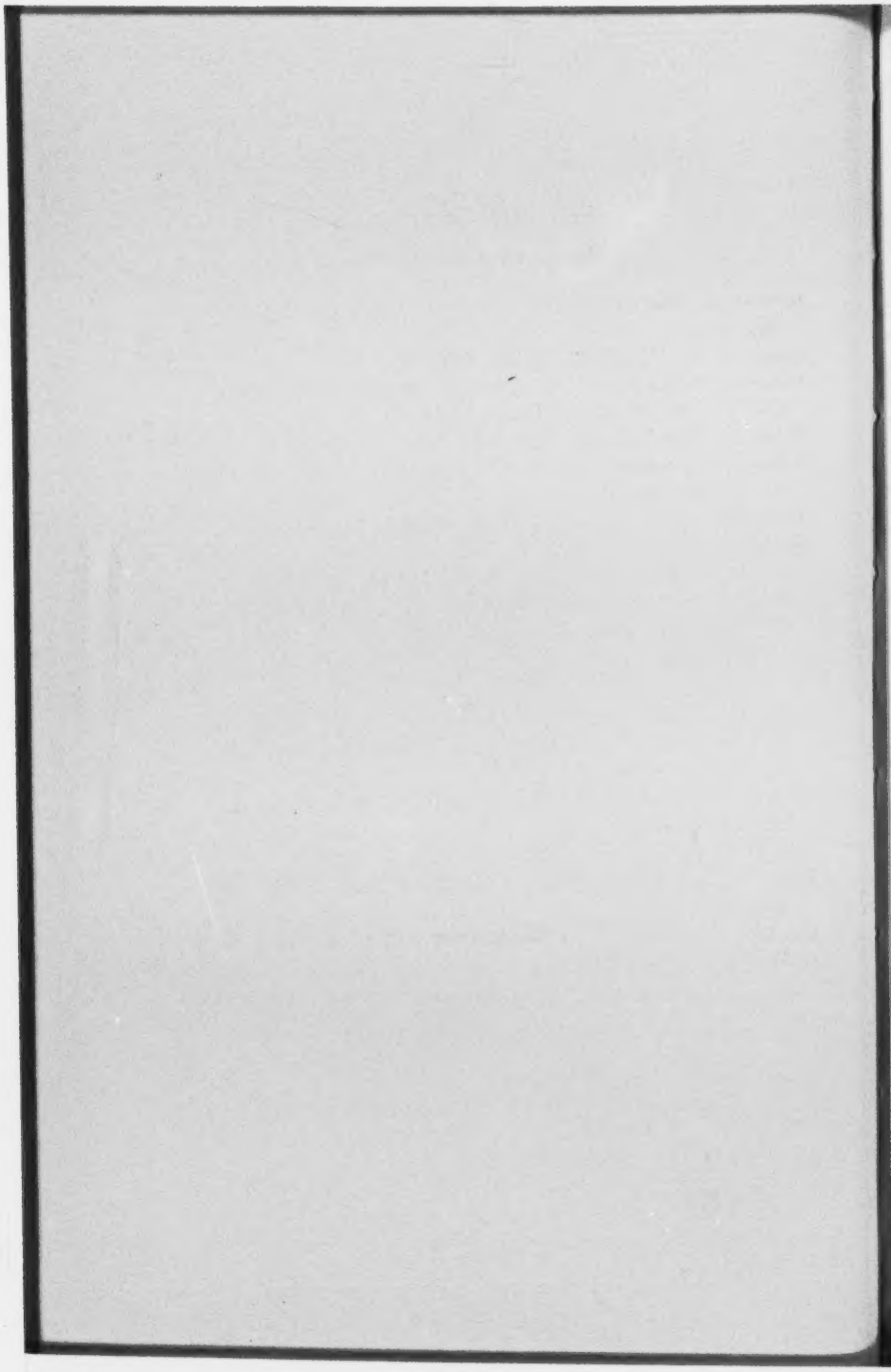
vs.

FRANK T. HINES, as Administrator of Veterans' Affairs.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

REPLY BRIEF OF PETITIONER TO RESPONDENT'S BRIEF IN OPPOSITION.

Warren E. Miller,
Counsel for Petitioner.



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Respondent on page 10 of Brief in Opposition states that petitioner's suit appears to be merely an effort to escape the bar of limitations which had fallen prior to the filing in the Veterans' Administration of the claim upon which he seeks to recover.

Both respondent and the court below lose sight of the fact that at no time did a remedy exist whereby this petitioner could file a suit under Section 19, World War Veterans' Act, 1924, as amended July 3, 1930 (46 Stat. 929-Title 38, U. S. C. A. Section 445) because *first,* this petitioner was not appointed administrator until March 7,

1932 (R. 3), which was after the time had expired July 3, 1931, in which to file claim so as to vest jurisdiction in the District Court under Section 19; and *second,* no "disagreement" existed in this case prior to July 3, 1931 (the last day suit could be filed under Section 19 of that act), as required by Section 19, which would confer jurisdiction upon the District Court.

The law is well settled that a "disagreement" is and has always been a jurisdictional prerequisite to the institution of suit under said Section 19 (*Pelkey* v. *United States,* 63 App. D. C. 211, 71 F. (2d) 221).

In the cases relied upon by the court below in its footnote 8 (R. 20) the remedy of filing suit existed at one time under Section 19 or other statute without suit being barred by the statute of limitations. In the instant case, however, at no time did this petitioner have the right to file suit under Section 19, and if the court has no jurisdiction, no *remedy* exists under which relief can be granted.

This Court in *Lynch* v. *U. S.,* 292 U. S. 571, at page 586 points out that Congress, in its repeal of laws pertaining to term insurance, mentioned on page 4 of respondent's Brief in Opposition, did not wish to deny the *remedy* if the repeal of the Constitutional right was held void under the Fifth Amendment. It further held that contracts of insurance such as this are property and as such are protected by the Fifth Amendment.

The cases mentioned in footnote 8 of the opinion of the court below have in effect been overruled by the decision of this Court in *Miguel* v. *McCarl,* 291 U. S. 442. In that case the court below, from whence the instant case comes, held that petitioner's claim for retired pay could only be determined in a suit instituted in the Court of Claims. This Court, however, in reversing the court below stated (291 U. S. at page 455):

> "We find no merit in the contention that * * * the suit cannot be maintained because petitioner has a remedy at law in the Court of Claims for his retired pay. *Smith* v. *Jackson,* 246 U. S. 388, 62 L. Ed. 788, 38 S. Ct. 353; (C. C. A. 5th) 241 Fed. 747, 760."

The petition filed herein asserted (R. 2) that the respondent should have paid benefits "in accordance with and in the amounts provided by such prior laws", as set forth in Section 35, Public 141, 73rd Congress (38 U. S. C. A. Section 511a). Where, as here, a claim for insurance benefits had been made prior to March 20, 1933, and the insurance had been found to have matured prior to that date, which finding was valid under the prior laws, the only authority conferred upon the Veterans' Administration by said statute is to determine the person or persons entitled to receive payment under said finding. It was provided by said act that the persons found to be so entitled "shall be paid such benefits in accordance with and in the amounts provided by *such prior laws.*" A review *"de novo"* was not authorized by this statute. Said statute amounts to a direction to the Respondent to pay the claim here sued upon, since every condition mentioned in said section existed in respect to said claim (R. 2).

Manifestly, therefore, the purpose of Section 35 of Public No. 141 is defeated where, as here, the Respondent disregards a finding, though valid under the legislation of Congress enacted prior to March 20, 1933, by unauthorizedly giving a retroactive effect to the legislation of Congress passed on and after said date, under which legislation he acted in overturning the prior administrative action.

True, by the Economy Act of March 20, 1933, it is provided:

> "Sec. 5. All decisions rendered by the Administrator of Veterans' Affairs under the provisions of this title, or the regulations issued pursuant thereto, shall be

> final and conclusive on all questions of law and fact, and no other official or court of the United States shall have jurisdiction to review by mandamus or otherwise any such decision."

In commenting upon this Act, which is similar to Section 5 of the World War Veterans' Act set forth on pages 12 and 13 of respondent's brief in opposition and mentioned (R. 19) by the court below, so far as finality of decision is concerned, this Court in *Lynch* v. *U. S.*, 292 U. S. 571, stated:

> "This section, as the Solicitor General concedes, does not relate to War Risk Insurance. It concerns only grants to veterans and their dependents—to pensions, compensation allowances and special privileges * * *."

Since this Court, in the *Lynch* case, *supra,* held that the attempted repeal by said Act of the laws granting or pertaining to yearly renewable term insurance was unconstitutional and void because such repeal would destroy the insured's contract right to the payment of his insurance, and that, under such circumstances, Congress could not have intended to repeal the right to sue on such contracts, the provisions of Section 5 of the Economy Act and Section 5 of the World War Veterans' Act, 1924, as amended, must be held to relate only to the reviewability by the courts of the Administrator's decisions on questions of compensation and other similar gratuitous allowances.

Hence, in the case at bar, the court has jurisdiction to inquire whether the Veterans' Administration misconstrued and misapplied the provisions of Section 35 of Public No. 141, 73rd Congress, in refusing to pay the amount of insurance the maturity of which had been determined *under prior existing laws.*

Respondent on page 7 of its Brief in Opposition states that the Insurance Claims Council was created by the Administrator and has no power except that conferred upon it by the Administrator. That is true and undisputed. However, when regulations have been once issued they become a part of the insurance contract.

Section 402 of the original War Risk Insurance Act of October 6, 1917 (40 Stat. 400) required the Director to "promptly determine upon and publish the full and exact terms and conditions of such contract of insurance." The first paragraph of the form of policy issued (which appears on page 39 of a brief filed by the Veterans Administration in this Court, October Term 1934, in the case of *Madison Miller, Jr.,* v. *United States,* No. 342) states:

> The United States of America, Treasury Department, Bureau of War Risk Insurance.
>
> "Under the authority granted by Congress in an act amending 'an act entitled "An act to authorize the establishment of a Bureau of War Risk Insurance in the Treasury Department," approved September 2, 1914, and for other purposes,' approved October 6, 1917, and *subject in all respects* to the provisions of such act, of any amendments thereto, and *of all regulations thereunder, now in force or hereafter adopted, all of which, together with this policy, the application therefor, and the terms and conditions published under authority of the act, shall constitute the contract:*" (Italics supplied.)
>
> "* * * War risk policies, being contracts are property and create vested rights. The terms of these contracts are to be found in part in the policy, in part in the statutes under which they are issued and the regulations promulgated thereunder." *Lynch* v. *U. S.,* 292 U. S. 571, 577, 54 S. Ct. 840, 842, 78 L. Ed. 1434.

Authorized regulations pertaining to war risk insurance form part of the contract, and are binding on both the

government and the insured. They have the force of law and are binding on the courts. *White* v. *United States,* 270 U. S. 175, 70 L. Ed. 530, 46 S. Ct. 274; *United States* v. *Cole* (C. C. A. 6th), 45 F. (2d) 339; *Ross* v. *United States* (C. C. A. 5th) 49 F. (2d) 541; *Bartee* v. *United States* (C. C. A. 6th), 60 F. (2d) 247.

An administrative regulation is subject to the rules of law equally with a statute. When promulgated it must be followed by all. To hold otherwise would work an injustice and permit an administrative officer to render decisions according to his own whims.

Conclusion.

It is respectfully submitted that this Honorable Court should grant petitioner's application for a writ of certiorari.

Respectfully submitted,

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